

PRIVY COUNCIL.

MAHOMED ABDUL KADIR AND OTHERS (DEFENDANTS) v. AMTAL
KARIM BANU (PLAINTIFF).*

[On appeal from the High Court at Calcutta.]

Acquiescence—Ratification of transfer of Property—Limitation Act (XV of 1877), s. 10—Trust.

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A solehnama in 1847, to which were parties the sons, daughters, and widow of a deceased Mahomedan proprietor, transferred the shares of two minor daughters in their father's estate, having been executed by their mother, the widow, on their behalf. On the question, whether the solehnama should be set aside, at the instance of the two daughters, on the ground of its having been beyond their mother's power to bind them, and of the instruments having been prejudicial to their interests, the evidence showed that it had been acted on and followed by possession, and that the daughters had, after attaining full age, allowed a lengthened period of twenty years to elapse without taking proceedings to dispute it; *Held* that, if the mother had exceeded her powers in executing the solehnama on their behalf, and if they might, at one time, have had it set aside, their long acquiescence was sufficient to show ratification of the transaction; and the solehnama was upheld.

As to limitation, it was not to be inferred from the evidence that the sons, by reason of their having managed their late father's estate, should be regarded as trustees, at the time of the execution of the solehnama, for the daughters; and, therefore, s. 10 of Act XV of 1877 was inapplicable. So that, as regarded the property included in the solehnama, suits instituted in 1882 by the daughters would have been barred by time.

CONSOLIDATED appeals from two decrees (13th April 1885) following one judgment of the High Court, varying two decrees (20th November 1883) following one judgment of the Subordinate Judge of Dacca in two suits, heard together.

The suits out of which these consolidated appeals arose were brought on the 7th July 1882 by two sisters against their two brothers, each sister suing separately and including the other sister as a co-defendant. The suits were heard together, and in the Courts below one judgment was given in both, the claims resting on similar grounds. The sisters were now severally respondents in the two appeals preferred by the brothers.

* *Present:* LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

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The general question raised was, whether the respondents, daughters of a Mahomedan proprietor, deceased in 1845, were entitled to possession with an account of past profits of their respective shares in his estate against their two brothers, who, after the father's death, had received the rents and profits of the estate; the respondents having parted with the shares to the brothers by transfers which they now sought to have set aside.

The facts are stated in their Lordships' judgment.

On the death of the father Mahomed Idris Khan in 1845, the plaintiffs, their father's widow Khadija, mother of the latter, and two sons of the deceased by a former wife, also another daughter, represented on this record, became entitled to proportionate shares in his estate.

The question between the parties involved the right of Khadija's daughters to have set aside the following documents of transfer alleged to have been executed on their behalf. The first was a solehnama, or deed of settlement of disputes, dated 6th January 1847, executed by Khadija for herself, and as guardian of her then minor daughters, and by Abdul Kadir, the eldest son, on his own behalf, and on that of his then minor brother, and two other minor sisters.

The second was a daemi miras ijara, or perpetual hereditary lease, dated 26th August 1864, purporting to have been executed by a mukhtar, Pran Nath Chuckerbutty, on behalf of the sisters, now plaintiffs, in favour of their brothers, in consideration of receiving Rs. 600 a year each. This they did receive till 1881.

As to the plaintiff's right to have these instruments set aside, and to recover possession of their shares, and to have an account taken from the time of Mahomed Idris's death in 1845, the Courts below differed; the first Court holding that the instruments in question were binding on the plaintiffs, and that these suits were also barred by limitation; the High Court holding, on the contrary, that neither of these instruments had been established against the respondents, and that limitation did not bar the suits.

The High Court (FIELD and BEVERLEY, JJ.), as to the solehnama of 1847, were of opinion that Khadija's execution of it was not binding upon the minors: her interests being adverse to

theirs. As to the daemi miras potta, which purported to have been executed on 26th August 1864 by the mukhtar Pran Nath Chuckerbutty, the Court was not satisfied with the evidence of his having been duly empowered. That being so, the daemi miras potta must fall to the ground. The Court also held that, even if the authority to the mukhtar had been proved, the defendants had not shown that the sisters understood the transaction which the mukhtarnama authorized, or that they had proper advice before entering into the transaction, which was not for their benefit.

As regards limitation, the Judges were of opinion that, less than two years before the suits were brought, the defendants were, as agents and trustees on behalf of the plaintiffs, managing and in possession of the property, both before and after 1864. It was only when the plaintiffs endeavoured to obtain an increase of the Rs. 60 per annum each, that the defendants set up an adverse title based on the miras potta of 1864, of which instrument the plaintiffs were not aware till the month of Aughran preceding the institution of these suits; which, accordingly were not barred. The High Court directed an account of the plaintiffs' shares in Mahomed Idris's estate from the date of his death in 1845 to be taken.

On this appeal, Mr. *R. V. Doyne*, for the appellants, argued that the grounds on which the High Court had reversed the decision of the Subordinate Judge were insufficient.

The solehnama of 1849 had been executed by Khadija, as mother and guardian of her minor daughters, and the High Court had not drawn a correct inference from the evidence in finding that the daughters' interests had been injured. Whatever might have been urged at one time on behalf of the daughters against the instrument, their claim to set it aside could not be maintained after the lapse of twenty years from the time of their attaining full age. This long acquiescence amounted to a ratification by the daughters themselves. So also in regard to the daemi miras ijara of 1864, the plaintiffs had been for many years receiving the annuities for which it provided, and thus it was not a correct conclusion that the ijara must fall with the mukhtarnama.

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The plaintiff's knowledge of the nature of the then intended lease was established by the evidence, and the plaintiffs had not shown any sufficient reason for setting aside their own act. Again, the High Court had erred in considering the law of limitation to be inapplicable. The possession of the appellants as lessees under the ijara of 1864 for more than twelve years before the institution of these suits had been shown, and thus the suits were barred.

The High Court say that the appellants' possession and management rendered them agents and trustees on behalf of the sisters. But this is incorrect. In regard to the solehnama, at all events, by which the taluks were separated, the brothers had no charge whatever of the shares or interests of the sisters, each daughter had become entitled to her share, and the mother (not the brother) was her guardian. There was no trusteeship as between the brother and the sisters. The suits were barred by Act XV of 1877, unless it should be held that the provisions of s. 10, relating to trusts for specific purposes excepted them from the operation of the general law. But it was clear that no such trust was involved by the brothers having, as manager, collected rents; and money actually received by the managers for the plaintiffs' use must be sued for within three years: see Art. 62, which prescribed that period counting from the date of the receipt of the money. Reference was made to Arts. 109, 120, 123, 127 and 144. In order to constitute the manager a trustee within s. 10, the property must have been vested in him; but it was not vested in him, nor had he accepted any such trust. Reference was made to the introduction of this exception into the law of limitation; and Reg. III of 1793, Acts XIV of 1859, s. 2, IX of 1871, and XV of 1877, s. 10, were referred to. Also, it was not sufficient to show a bare fiduciary relationship. *Ahmed Mahomed Pattel v. Adjein Dooply* (1), *Kherodemoney Dassee v. Doorgamoney Dassee* (2), *Greender Chunder Ghose v. Mackintosh* (3), *Sarodapershad Chattopadhyaya v. Brojo Nath Buttacharjee* (4), *Manickavelu Mudali v. Arbuthnot & Co.* (5), *Arunachala Pillai v. Ramasamiya Pillai* (6), were cited in

(1) I. L. R., 2 Calc., 323.

(4) I. L. R., 5 Calc., 910, 915, 921.

(2) I. L. R., 4 Calc., 455.

(5) I. L. R., 4 Mad., 404.

(3) I. L. R., 4 Calc., 897.

(6) I. L. R., 6 Mad., 402.

reference to s. 10. Reference was made to Lewin on the Law of Trusts, Chap. XXX, s. 1, p. 863 ; Darby and Bosanquet on the Law of Limitation, p. 183.

Mr. J. Graham, Q.C., and Mr. J. H. A. Branson, for the respondents, argued that, in accordance with the judgment of the High Court, which was correct, neither the solehnama of 1849, nor the daemi miras potta of 1864, should be maintained against them. In regard to the former, the mother was not entitled to convey as she had purported to do, nor was she authorized by her position with reference to her daughters to convey ; and the transfer was in disregard of the interest of infants.

As to the miras potta, the finding of the High Court that there was no satisfactory evidence of the execution of the muktarnama authorizing Pran Nath Chuckerbutty to sign for the sisters, was correct. And both the Courts below had been right in finding that the nature of the transaction had not been explained to them as it should have been.

Again, the judgment of the High Court had correctly proceeded upon their opinion of the law of limitation being inapplicable. The collection of rents by the managing member of the family estates did, as soon as they were in his' hands, constitute him a trustee on behalf of the sharers. He was liable to account to them in respect of their shares. He was their agent to collect for the family, and this relation once established, the liability to account followed.

As to what would establish a liability to account, reference was made to *Wall v. Stanwick* (1), *Hobbs v. Wade* (2), *Thomas v. Thomas* (3), *Hurrocomaree Dassee v. Tarine Churn Bysack* (4), *Durga Prasad v. Asa Ram* (5).

As to a suit against a managing member of a Hindu family, reference was made to *Obhoy Chunder Roy Chowdhry v. Pearee Mohun Goocho* (6).

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(1) L. R., 34 Ch. D., 763.

(2) L. R., 36 Ch. D., 553.

(3) 2 K. & J., 79.

(4) I. L. R., 8 Calc., 766.

(5) I. L. R., 2 All., 361.

(6) 13 W. R., F. B., 75 ; 5 B. L. R., 347,

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As to the guardianship of the minor sisters, Macnaghten's Mahomedam Law, p. 62, and Tagore Law Lectures, 1873, p. 477, were referred to.

Mr. R. V. Doyne replied.

On June 23rd their Lordships' judgment was delivered by

SIR R. COUCH:—These are consolidated appeals in two suits brought by the respondents respectively against the appellants, in which one judgment was given by the lower Courts and a similar decree made in each suit. The respondents (the plaintiffs) are the daughters of Moulvi Mahomed Idris, who died at Dacca in December 1845, by his second wife, Khadija, who survived him. The appellants, Abdul Kadir and Abdur Rahman, are his sons by his first wife, Biju, who died before him. By her he had also two daughters, Amatulla and Amtal Rahman, who survived him. At the time of their father's decease the respondents were living with him at Dacca, and, almost immediately afterwards, they left Dacca with their mother Khadija, and went to live at the house of their maternal grandfather, and continued to live there until Khadija married again. From there, soon after her second marriage, the respondents were removed by their brothers and were taken to the house of the brothers in Sylhet, where they lived until 1864. At that time, they being about 22 or 23 and 20 or 21 years of age, respectively, arrangements were made by their brothers for their marriages, and they were taken to Dacca, and, 15 or 20 days after their arrival there, were married to their present husbands. From the death of Mahomed Idris the property left by him was managed by the elder brother, the first appellant, and apparently by the younger, the second appellant, also, after he came of age, and the brothers received the rents and profits of the property.

In each of the suits the plaintiff claimed possession of a 1 anna 15 gundahs share of the immoveable properties mentioned in the schedules to the plaint, and to have an account taken and payment of the balance found due. The first schedule contained the properties left by Mahomed Idris, and the second contained properties alleged to have been acquired after his death from the profits of the properties left by him.

There were two grounds of defence. One, as to properties called in the plaint taluks Nos. 3 and 4, was founded upon a solehnama, dated the 6th of January 1847, made between Abdul Kadir for himself and as guardian of his minor brother Abdur Rahman and his minor sisters Amatulla and Amtal Rahman, and Khadija for herself and as guardian of her minor daughters Amtal Karim and Amtal Kadir. By this, after reciting that there was a dispute in respect of the immoveable property left by Mahomed Idris, for settling the dispute between them the parties made an amicable settlement to the effect that out of the taluks which were left by Mahomed Idris, and detailed in a schedule, the taluk No. 3, Alum Reza, bearing a jamma of Rs. 1,293-3-8, and jammai land with nankur and khanabari (homestead land) appertaining thereto, and taluk No. 4, Asadar Reza, bearing a jamma of Rs. 1,400-11-11, with jammai land and nankur khanabari appertaining thereto in Joar Baniachung, Zillah Nabigunge, and two annas share of the houses described, were given in lieu of a sum of Rs. 11,250, with interest, on account of the dower of the deceased mother of Abdul Kadir and his minor brother and sisters which was due to them from their father, by Khadija on her own account and as guardian of her daughters, and the said property was made over to them; and taluk No. 9, Mahomed Manwar, bearing a jamma of Rs. 343-12-3, and the jammai land and nankur khanabari in proportion to the aforesaid jamma, and taluk No. 11, Mahomed Mansoor, bearing a jamma of Rs. 168-1-8, with jammai land and nankur khanabari appertaining thereto in Pergunnah Langla which were covered by the kabinnama of Khadija, were given to her by Abdul Kadir, and other land in the taluks mentioned, was divided by giving to Abdul Kadir and his minor brother and sisters $10\frac{1}{2}$ sixteenths as their share, and to Khadija and her daughters $5\frac{1}{2}$ sixteenths as their share.

The other ground of defence was that the plaintiffs having been married and settled to live permanently at Dacca, they made a proposal to the brothers to give them a daemi mirasi ijara for ever, at a permanently fixed jamma, of their shares of the properties left by their father, and the brothers (the appellants) agreed to take it on the condition of paying Rs. 100 a month, Rs. 50 being paid to each of the plaintiffs.

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Their Lordships will first take the case of the solehnama. It is dated the 6th of January 1847, and thus was made two years after the death of Mahomed Idris. It was found by the Subordinate Judge to have been executed by Najumul Hossein, the father of Khadija, and that he had power to execute it on her behalf. It was argued by the learned Counsel for the respondents that Khadija had no authority to convey the shares of her daughters. In the view their Lordships have taken, it is not necessary to give an opinion upon this question, and the learned Counsel for the appellants having been relieved from replying upon this part of the appeal, he has not been heard upon this objection. The Subordinate Judge was of opinion that Khadija had had the benefit of good and independent advice, but that the defendants had failed to prove that the solehnama was beneficial to the plaintiffs. He held, however, that the plaintiffs having allowed 20 years to elapse, even after attaining their majority, without taking any steps to set it aside, it was too late for them to question the validity of the transaction on the ground of its having been prejudicial to their interest. The High Court, on appeal from the decrees which he made, held that the transaction was not binding on the plaintiffs, especially in the absence of evidence to show that it was the best arrangement which could under the circumstances be made in their interest.

In their Lordships' opinion, the High Court, in deciding that the solehnama did not bar the right of the plaintiffs, did not give proper effect to the lapse of time between 1847 and the bringing the suit in 1882, and the inference which should be drawn from the evidence in the suit that possession was had in accordance with it. That Khadija took possession was proved by her having subsequently made an alienation of part of the property assigned to her. There is, indeed, no direct evidence as to what the brothers did with the taluks Nos. 3 and 4, but it may be fairly inferred that they did not treat them as part of the joint property in which the plaintiffs had shares, and that they received the rents of them as property which belonged only to themselves and their minor sisters. Assuming that Khadija had no power to transfer the plaintiffs' shares,

or that they might have had the solehnama set aside, their making no objection to it for so many years after they attained majority is sufficient evidence that they ratified and adopted it. There was also the defence of the law of limitation. The High Court, in dealing with this, made no distinction between the taluks No. 3 and 4 and the other property. They said that up to a period less than two years before the institution of the suits the defendants were as agents and trustees in possession of and managing the property on behalf of the plaintiffs. This may have been the case after Khadija's second marriage and the plaintiffs being taken to the brothers' house, but there is no evidence that the brothers should be regarded as trustees for the plaintiffs at the time of the execution of the solehnama. Section 10 of Act XV, of 1887 is, therefore, not applicable, and it is unnecessary for their Lordships to put a construction upon this section. It appears to them, if it were necessary to decide it, that, as regards the property included in the solehnama, the suits are barred by the law of limitation.

The defence under the daemi miras ijara-potta, or perpetual lease, has now to be considered. The case of the defendants is that the plaintiffs executed a mukhtarnama, dated the 7th Bhadro 1271 (22nd August 1864), by which, reciting that they had inherited from their father $3\frac{1}{2}$ annas share of the property named in it, and the same was being let out in perpetual miras ijara to the brothers Abdul Kadir and Abdur Rahman, they appointed Moonshi Pran Nath Chuckerbutty as a mukhtar for the purpose of signing their names on the perpetual miras ijara-potta and causing registration of the same. And that, on the 26th of August 1864, Pran Nath Chuckerbutty signed their names to a daemi miras ijara-potta of the taluks mentioned in the schedule to it, at an annual rent of Rs. 1,200, namely, Rs. 600 on account of the share of each, to be paid by instalments of Rs. 600, and the document was registered.

There is now no dispute as to the execution of the potta by Pran Nath Chuckerbutty. The material question is whether the mukhtarnama was executed by the plaintiffs. It is attested by five witnesses, of whom only two were examined, and the absence of the others was not in any way accounted for. Of one

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of the witnesses examined, Chamu Bibi, the Subordinate Judge said: "I find it difficult to believe that she could, without any assistance, recollect the execution of the mukhtarnama so circumstantially as it was described by her. It seems to me as very probable that her knowledge of the details was not derived entirely from her memory. That circumstance, together with the dependence of the witness on the defendants, makes her evidence unreliable, unless corroborated by other evidence." The other witness, Masudar Reza, had been in the service of the defendants for many years, but had left it five or six years before the trial, and did not appear to have then any connection with them. He said: "The Bibis put their marks on that mukhtarnama. I saw the aforesaid Bibis putting their marks. Remaining behind a screen they put their marks by extending their hands. I saw it. From respectable people there I ascertained and believed that the aforesaid Bibis put their marks. I do not recollect the names of the persons from whom I ascertained it." This witness is described in the attestation as resident of Kumartoli, and one of witnesses not examined is described as inhabitant of Kumartoli in Dacca. The potta is attested by nine witnesses, three of whom are described as of Kumartoli, and others as being at Dacca. If the mukhtarnama was really executed as described, it is singular that it was not attested by some of these persons or of "the respectable people there," of whom Masudar Reza spoke.

The other evidence to prove its genuineness consisted of an order, dated the 22nd of August 1864, signed by Mr. Pennington, Principal Sudder Amin, on the back of the mukhtarnama, stating that it had been produced "to-day" by Moonshi Giasuddin, Mohurir, and, as an inquiry was necessary, ordering the Nazir to make it; and a report of the Nazir, also on the back of it, dated the 23rd of August, which stated that he went to the residence of the plaintiffs, and that they were identified by their relations Khaja Abdulla, Khaja Abdul Wajed, and Khaja Abdul Nubbi, and admitted the execution of the mukhtarnama and agreed to its terms. Mahomed Yusuf, the Nazir, was examined, and said he did not recollect anything about the inquiry, and that the signature at the foot of the report resembled his writing,

but he could not swear it to be genuine or not. On the next day, the 23rd, the mukhtarnama was ordered to be given back to the man who presented it, namely, Giasuddin. As Principal Sudder Amin, Mr. Pennington had no authority to order the inquiry to be made. Giasuddin was a Mohurir of the Court of the First Subordinate Judge and general mukhtar of the defendants, and Mr. Pennington may have thought that the mukhtarnama was for business in the Court. The High Court properly held that the report was not by itself evidence of the facts stated in it. Khaja Abdulla and Abdul Wajed were examined. On the testimony of the former the Subordinate Judge said he placed little reliance. The latter deposed to seeing rent being paid and received on twelve or fourteen occasions, and that receipts were granted for it, and he saw them signed. It was said by Khaja Abdulla that Pran Nath Chuckerbutty was present when the mark signatures were put and when the Nazir made the inquiry, and yet he was not called as a witness, although he appeared to be living and might have been examined. Their Lordships are not satisfied that the Nazir ever made the inquiry.

It remains to notice a fact which, though possibly consistent with the truth of the defendants' case, raises a strong suspicion against it. A number of receipts were produced by the defendants appearing to be given by Amtal Kadir each for sums of Rs. 50. They contained a statement that she had given a lease in perpetuity to her brother Abdul Kadir and others in lieu of a salary or allowance of Rs. 50 as malikana money, and acknowledged the receipt of Rs. 50 as allowance for the month mentioned in the receipt. They seem to have been worded so as to support the case set up in the defendants' written statement. They were rejected by both Courts as not genuine. No other receipts were produced, nor any accounts showing that rent had been paid to the plaintiffs. Thus Abdul Wajed's evidence as to receipts being signed appeared to be false. The High Court, differing from the Subordinate Judge, said they were not satisfied that the defendants had succeeded in proving the execution of the mukhtarnama, and the evidence does not satisfy their Lordships that it was executed.

The Subordinate Judge found that certain properties in one of the schedules to the plaint did not appear to be covered by

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the miras potta, and he gave the plaintiffs a decree for those properties with proportionate costs, and dismissed the suits as regards the remainder of their claims. The High Court reversed that decree, and declared that, in addition to the shares of the properties decreed to the plaintiffs by the lower Court, they were entitled to shares of the remaining properties other than the taluks Nos. 9 and 11, which were allotted to Khadija by the solehnama, and had been sold and were in the possession of persons who were not parties to the suits, and they were also entitled to shares of such property or properties specified in the second schedule to the plaint as upon the making of the inquiry thereafter directed might be found to have been purchased out of the surplus profits of the properties other than the said two taluks, and to a share of the surplus profits of the properties in the first schedule, other than the said two taluks, from December 1845 to the date of delivery of possession, and they ordered accounts to be taken from that date. As to the accounts, it appeared that the plaintiffs had, up to November 1881, been receiving Rs. 1,200 annually. Their Lordships think the evidence of Abdul Wahed, the husband of Amtal Karim, shows that this sum was agreed to be taken as the plaintiffs' share of the profits, and was so received by them until they asked, in November 1881, to have their allowance increased, from which time they refused to receive it. Their Lordships, therefore, consider that the accounts decreed by the High Court should only be taken from November 1881. The result is that, in their opinion, the decree of the High Court should be varied by omitting therefrom the taluks Nos. 3 and 4, which were included in the solehnama, and ordering the accounts to be taken from November 1881 instead of December 1845. They will humbly advise Her Majesty accordingly. As to the costs of these appeals, they think the partial success of the appellants does not entitle them to the costs, and they order that the parties bear their own costs.

Decree varied.

Solicitors for the appellants: Messrs. *Wrentmore and Swinhoe.*

Solicitors for the respondents: Messrs. *Watkins and Lattey.*

KALI KRISHNA TAGORE (PLAINTIFF) v. THE SECRETARY OF
STATE FOR INDIA IN COUNCIL AND ANOTHER (DEFENDANTS)*

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[On appeal from the High Court at Calcutta.]

Res judicata—*Civil Procedure Code (Act XIV of 1882), s. 13,—Act IX of 1847—Alluvion.*

To apply the law of estoppel by judgment, stated in s. 6 of Act XII of 1879 and in s. 13 of Act XIV of 1882, it must be seen what has been directly and substantially in issue in the suit, and whether that has been heard and finally decided; for which purpose the judgment must be looked at. The decree is usually insufficient for showing this: as, according to the Code, it only states the relief granted, if any, or other disposal of the suit, without the ground of decision, and without affording information as to what may have been in issue and decided.

This suit was to establish a right to land, and for possession, against two defendants, who alleged their rights respectively. The claimant had previously obtained a decree against one of the defendants, and in that decree the land now claimed had been excepted.

Held, that the matter now in issue, not having been directly and substantially in issue in the prior suit, the present suit was not barred under s. 13, Act XIV of 1882, Civil Procedure Code.

APPEAL from a decree (4th March 1885) of the High Court, varying, on cross-appeals, a decree (20th August 1883) of the Subordinate Judge of the Backergunj District.

On this appeal the first question was whether, between the parties to this suit, there had been a hearing and adjudication of the matters now directly and substantially in issue. Both suits related to the ownership of land gained by alluvion of the river Arial Khan in the Backergunj District, between two river-bordering zemindaries,—the one, Nazirpur, belonging to the plaintiff, and the other, Saistabad, belonging to the second defendant. On these estates land was washed away by the river between the years 1830 and 1841, and afterwards, by its recession, five churs were formed separated by *dones*, or streams. It then was disputed to which zemindari part of them belonged, as being formations on the original site of the land lost by diluvion. Also the right of the Government to assess and settle new formations in the channel came into question.

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In 1841, as the result of proceedings before the Special Commissioner of Murshedabad, a chur named Gopalpūr was made over to Gopal Lal Tagore, then the owner of Nazirpur; and another chur, named Chatua, was made over to the owner of Saistabad. In after years the river Arial Khan made channels through both these churs; and the changes took place, which are described in their Lordship's judgment.

In 1860 a survey was made, under orders of the Revenue authorities, in pursuance of Act IX of 1847 (regarding the assessment of lands gained by alluvion or dereliction). Also, in 1868, the accretions were mapped in a Thak survey. Further formations by alluvion took place about 1871; and, in 1873, Muazzem Hossein took possession of a portion which he alleged to be an accretion to his chur Chatua. But the officers of the Diara Survey, taking a different view, measured it as excess land of Chatua, and it was represented in the Diara Survey map of 1881 as beyond the boundary of that mauza. On the 24th September 1879 Muazzem's claim to this was heard and rejected by the Superintendent of Diara Surveys, whose order was, on the 6th February 1881, supported by the Commissioner of the Dacca Division, it being found that the newly-formed lands claimed by the owner of Chatua were not accretions to it, or part of it. Muazzem then, without resorting to the Civil Courts to dispute the order of the Revenue Courts, accepted a settlement of the land as in excess of Chatua; and an amulnamah was granted by the authorities enabling him to receive the rents of the cultivators located on it.

Meantime, the plaintiff, who was not a party to the proceedings taken by the Diara Survey officers, filed a suit (No. 1 of 1881), in the Court of the Subordinate Judge, against Muazzem, claiming the land as a formation on the original site of land lost by diluvion from his chur Gopalpur. He alleged that it had appeared gradually since 1873, having become cultivable since 1877. For his defence Muazzem, besides alleging that the land was an accretion to his chur Chatua, insisted that it could not be decreed to the plaintiff as against the Government, through whom he had a title to the possession of the land measured as excess. The judgment of the Subordinate Judge

(23rd February 1882) was in favour of the plaintiff as to a portion of the disputed lands. He found that it was included in the Thak of 1868 as part of Gopalpur. Excepting the 300 bigahs marked D on a map made by an Amin of his Court, that being the land settled as the excess of Chatua, the decree was for the plaintiff. But as to plot D, his judgment was that so long as the order of the Superintendent of Diara Surveys, directing that this should be measured as excess of chur Chatua, remained in force, "the plaintiffs right to it must be held to be either extinguished, or in abeyance." The decree dismissed the suit as to this plot, and from that decree the plaintiff did not appeal. The defendant Muazzem appealed to the High Court, and his appeal stood over until it was heard along with the appeal in the present suit in March 1885. The plaintiff then filed the present suit (9th January 1883) against the Government, represented by the Collector of the District, the first defendant, and making Muazzem the second defendant. He claimed a declaration of his proprietary right in, and possession of, the 300 bighas (marked D on the Amin's map), as being "re-formation on the original site of land within his zemindari," describing it in para. 12 of his plaint by reference to the survey maps. He referred to his previous suit, No. 1 of 1881, and the exception of D. from the decree of 23rd February 1882; and he claimed mesne profits.

The defence of the Government was that the suit, contesting the proceedings of the Diara Survey officers, could not be maintained; and that the land in dispute belonged in fact to neither of the zemindars, having been formed by the drying up of a navigable *dong* which existed during the time of the first survey. The defendant Muazzem alleged his right through the Government, as well as independently.

The Subordinate Judge was of opinion that the question had been determined in favour of the plaintiff by the decision of 23rd February 1882, and decreed the claim, save as to the 300 bighas (marked D on the Amin's map), with mesne profits, for three years, against Muazzem.

From this judgment both the zemindars (plaintiff and defendant) appealed to the High Court; but the Government did not

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1888 appeal, and accordingly was made respondent in both appeals.
 KALI The appeals were heard by a Division Bench (Pigot and
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 TAGORE 1881 by consent of parties, and one judgment (4th March 1885)
 v. THE was delivered in the three appeals, or in both suits. In the appeal
 SECRETARY OF STATE in the suit No. 1 of 1881 the High Court was of opinion that
 FOR INDIA the evidence was in favour of the plaintiff, and they dismissed
 IN COUNCIL the appeal.

In considering the present suit, the Judges observed that the first question was as to the effect of the decree in the prior suit, No. 1 of 1881; and in their opinion that decree defined the limit of the estoppel arising from the proceedings. Upon the question, whether the plaintiff was entitled to any relief as against the Secretary of State, the judgment was that a declaratory decree should be refused. The result was a decree dismissing the present suit.

On this appeal, Mr. *J. D. Mayne* and Mr. *C. W. Arathoon* for the appellant argued that the High Court was wrong in holding that the decree of the Subordinate Judge of 23rd February 1882, in the suit of 1881, barred the present suit. In deciding that the plaintiff in the suit of 1881 had made good his claim to the land which was adjudged to him, the judgment had not so defined the quantity as to preclude the plaintiff's recovering what he now sued for, on his making proper parties to the suit; and the decree in that suit should have been read with the judgment on which it was based. Also, there was a difference in the issues now raised from those in the former suit, the Government being a party on the present record. A reference to the judgment showed at once that there had not been in the former suit any final decision against the plaintiff's claiming the lands now in suit, *viz.*, the 300 bigahs excluded from the decree in the former suit; because the reason given for the exclusion was that the order of the Superintendent of Diara Surveys, dated 24th September 1879, remained in force treating the land as excess lands. That order could be set aside in proceedings against the Government. There was, therefore, only the decision that the 300 bigahs (marked D on the Amin's map), could not be recovered in that suit. Neither of the respondents had raised

the question of estoppel in their written statements, nor had an issue on this point been framed, or disposed of in the Court of first instance.

Reference was made to Act XII of 1879, s. 6; and to the Civil Procedure Codes (Act X of 1877, s. 13, and Act XIV of 1882, s. 13).

It was also contended that the finding of the Subordinate Judge as to the *done*, or stream, in which the accretion was formed, not having been shown in the earlier maps as included within the plaintiff's land, was an error on his part.

Mr. R. V. Doyne and Mr. J. H. A. Branson appeared for the first respondent, the Secretary of State for India in Council. They contended that the plaintiff's suit was barred by the decision of 23rd February 1882, as *res judicata*. The plaintiff had put forward in the present suit the same claim that he made in the former. The defence in the former suit was that it was for him to make the Government a party, as to the 300 bighas in question. The plaintiff, thereupon, should have applied for leave to make it a party or for leave to abandon that part of his claim which contravened the orders of the Diara Survey Superintendent and the Commissioner of the Dacca Division, with liberty to bring a fresh suit. He made neither the one application nor the other; and his suit, as to this part of his claim, was dismissed by a Court competent to give relief between the parties, or those who should have been made parties. No new circumstances had since arisen. The test was not whether there had been an adjudication, or not, upon a title then put forward; but whether, but for the plaintiff's own conduct, there would not have been an adjudication. They referred to the explanations, 2 and 3, under s. 13, Civil Procedure Code.

Mr. J. D. Mayne replied.

On a subsequent day (23rd June) their Lordships' judgment was delivered by

SIR R. COUCH—This is an appeal in a suit brought by the appellant against the Secretary of State for India in Council (represented by the Collector for the district of Backerganj),

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and Maulvi Syed Muazzem Hossein Chowdhry, to obtain possession of about 300 bighas of land (described as marked D in a map prepared by the Civil Court Amin in a previous suit) being re-formation on the original site of the plaintiff's zemindari, and to have it declared that the proceedings and orders in connection with the Diara Revenue survey of the disputed lands; by which the land had been attached as liable to be assessed for revenue, and a temporary settlement of it made with the defendant Muazzem Hossein Chowdhry, could not stand against the plaintiff's right, and were not binding on him.

The written statement of the Collector of Backergunj denied that the land in dispute was a re-formation on the original site of the plaintiff's land, and asserted that it was not included in the old Thakbust or Survey boundaries as plaintiff's estate. It also stated that the boundary between the plaintiff's land called Gopalpur, thakked in No. 1585, and the defendant Muazzem Hossein's land called Chatua, thakked in No. 1625, was not a line during the time of the Thakbust or Survey measurement, but a big and navigable *dong* (or stream), the bed of which was the property of no individual, and as such was at the disposal of the Government under the present law; that the land in dispute was formed by the drying up of the big and navigable *dong* which existed at the time of the first survey between Gopalpur and Chatua, and as such was assessable as surplus under the existing law. Muazzem Hossein in his written statement relied upon the proceedings of the revenue authorities with regard to the diara as being final, and also claimed the land as re-formation on the original site of his lands.

The appellant and Muazzem Hossein are proprietors of two contiguous estates, viz., Nazirpur and Saistabad respectively. Some time before 1842 considerable portions of these estates were diluviated by the river Arial Khan. On the re-appearance of the land, in the shape of five churs separated from each other by *dongs*, resumption proceedings were instituted by the Government, but ultimately the churs were released, and an Amin named Sumbhu Nath was deputed by the Collector to make over to the proprietors the different portions of the re-formed land appertaining to their estates. In 1842 the Amin, after making a measurement

of the lands, prepared separate chittas and a sketch map assigning different portions of the land to the several proprietors. The lands assigned to the ancestor of Muazzem Hossein were named chur Chatua, and those released to the appellant's father, Gopal Lal Tagore, were called chur Gopalpur. Some years after, but it is not clear when, the river again changed its course, and, flowing through Chatua and Gopalpur, washed away portions of these two mouzas. In 1868 a Thak survey was made, and after that the river gradually receded towards the east, and is now flowing through the appellant's land of Gopalpur. The land in dispute, which the appellant claims, is the newly-formed land on the west of the river, in contiguity with the lands of Chatua. After this last re-formation the western portion of the land in dispute, together with some other land, was measured by the Diara Survey authorities in 1879 as excess lands of Chatua. Muazzem Hossein objected to this, and claimed the land as re-formations on the site of the diluviated land of his mouza Chatua. The objection being disallowed, instead of bringing a suit to set aside the order of the revenue authorities, he accepted a settlement of the land from the Government as an accretion to his mouza. In 1881 the appellant sued him for this and other lands, and he pleaded that the land claimed was a re-formation of the diluviated land of Chatua, and also claimed to hold as before of the Government. An issue was settled, "whether the land in dispute is a re-formation on the site of the plaintiff's chur Gopalpur, or on the site of the land of chur Chatua, released to the defendant." The Court found this issue in favour of the plaintiff (the present appellant), but went on to say that so long as the order of the Superintendent of Diara Surveys remained in force and was not set aside, "the plaintiff's right to the portion of the disputed land measured as surplus accretion to Chatua, and settled with the defendant, must be considered as either extinguished or in abeyance. Consequently the plaintiff is not entitled to recover it now." It was ordered that the plaintiff should recover possession of a portion of land described by reference to a map prepared by the Amin, excluding therefrom the portion covered by the plot marked by the Court as D in the map. This plot is the land which is the subject of this appeal.

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By the Act IX of 1847, "An Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction in the Provinces of Bengal, Behar and Orissa," it is enacted that the Government of Bengal, in all districts or parts of districts of which a revenue survey may have been completed and approved by Government, may direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and cause new maps to be made according to such new survey. In 1860 a survey was made under this Act.

It is said by the Subordinate Judge in his judgment in this suit that, on comparison of the Thak and Survey maps by the Civil Court Amin, it has been found beyond doubt that the land in dispute was then thakked as part of the plaintiff's mouza Gopalpur, and that the assertion of the defendants to the contrary was erroneous. And he held the map to be an admission by the Government of the plaintiff's title. It could not be disputed that it made a *prima facie* case against the Government. However the case of the appellant was not rested only upon this admission. The proceedings in 1842 were put in evidence by him, and from an examination of these their Lordships have come to a conclusion in his favour. The decision of the Special Commissioner of Murshedabad and Calcutta, dated the 15th December 1841, contains a history of the proceedings for assessment of Government revenue on the five churs which appear to have begun in 1833. It is stated that the Collector decreed the case in favour of the Government, and, on an appeal from his decision, it was set aside by the Special Commissioner, and it was ordered that whatever accreted lands might, on investigation, be found to have accreted to the original site by the Government officers, should be released from the claim of the Government.

In October 1842 Sumbhu Nath, the Amin who, as has been stated, was deputed to make over to the proprietors the different portions of the released lands, made two reports, one relating to 14,359 bighas 14 cottahs 3 dhoors of land, and the other to 6,792 bighas 16 cottahs 6 dhoors. In the former of these reports

is the following passage :—" The measurement by Anund Chunder Mookerji and Joychunder Chatterji " (a measurement made in the year before the decree of the Special Commissioner), " shows that there were 20,391 bighas 13 cottahs of land inclusive of *done* in the five plots of chur. The lands in those five plots of chur, inclusive of khal and *done*, amount, by my measurement, to 21,152 bighas 10 cottahs 9 dhoors of land in all, and so there is an excess of 760 bighas 17 cottahs 9 dhoors of land measured by me in the five plots of chur." In the other report, where he speaks of the quantity of land being relinquished to other parties than the appellant's ancestor, Gopal Lal Tagore, he says " including khals and *done*s." Thus the *done*s appear to have been included in the plots. At page 61 of the record there is a document described as the measurement chitta of the lands in five plots of chur included in the Haria and Chaola rivers being the subject of dispute between the Government and Gopal Lal Tagore in cases Nos. 1474 and 1555 pending trial.

In several places a *done* is mentioned as included in the quantity of land. In the Amin's sketch-map, which accompanied the reports, the *done* in question appears to run between Dag. 8 in the 3rd plot and Dag. 15 in the 4th plot, the latter being described as land of Nazirpur. The description of Dag. 15 in the chitta is " north of the lands formed by alluvion after diluvion of mouza Kala" (worm-eaten), " to which the appellants Kumla D" (worm-eaten), " and others named in the decree No." (worm-eaten) " are entitled east of Dag. 8, west of the *done* to the west of the 5th plot and south of the lands of Jharna Bhanga chur, 4th plot." Thus on the opposite side to where the *done* in question was situate, we have a *done* between the 4th and 5th plot given as the boundary, but, on the other side, Dag. 8, and not the *done*, is given as the boundary, and in the description of Dag. 8 it is said to be west of the 4th plot. In the summary at p. 84 of the land of Nazirpur, the zemindari of Gopal Lal Tagore, the total quantity, including the 4th plot, is given, and of this quantity all the plots, except the first, appear in a column headed " Waste land with *done*." It appears to their Lordships that in 1842 the whole of the land and water within the ambit

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of the five plots or churs was measured and released by the Government, and no part of the *done*s was reserved. The evidence of what was done at that time, instead of rebutting the evidence of the map of 1860, supports it. The finding of the Subordinate Judge, that the part of the *done* which in 1842 covered the disputed land was not given to any of the parties to whom lands were allotted by Sumbhu Nath, is, in their Lordships' opinion, opposed to the evidence.

The Subordinate Judge refused to make a decree against the Secretary of State, and made a decree, which was unnecessary, that the appellant should recover possession of the land of which possession was decreed in the former suit. The present appellant and Muazzem Hossein both appealed to the High Court, the latter having also appealed against the decree in the former suit. The three appeals were heard together. The appeal in the suit of 1881 was dismissed. In the other appeals the High Court did not give any judgment upon the facts. They said the first question was as to the effect of the decree in the suit of 1881; that the claim of the plaintiff in respect of the portion marked D in the map "was dismissed, that is to say, the relief prayed for by him in respect of it was not granted. Whatever were the reasons which led the Lower Court to take that course and not to grant the plaintiff any relief in respect of that portion of the property, the decree as it stands constitutes the record of the rights of the parties, and is the source that defines the limits of the estoppel arising from the proceedings. We cannot look to the judgment as we were asked to do in order to qualify the effect of the decree, . . . it must be treated as a decree binding as between him and the 2nd defendant, the effect being that there is no claim against the defendant in respect of that property." Thus the High Court have given to the decree an effect directly opposed to what was intended by the Subordinate Judge, it being clear that he only intended to decide that the plaintiff was not then entitled to possession. The law as to estoppel by a judgment is stated in s. 6 of Act XII of 1879, and s. 13 of Act XIV of 1882. It is, that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally

decided. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided. Even if the judgment is not to be looked at, the High Court have given to the decree a greater effect than it is entitled to. The decree is only that in that suit the plaintiff is not entitled to the relief prayed for. It does not follow, as the learned Judges of the High Court think, that he can never have any claim against the defendant in respect of the property.

Upon the question, whether the plaintiff was entitled to any relief as against the Secretary of State, the High Court, having thus decided as to the estoppel, considered it was not a case in which, in the exercise of their discretion, a declaratory decree should be made. Whether they were right in this or not is not now material, the appellant being, in their Lordships' opinion, entitled to more than a declaratory decree. The appeal of the present appellant to the High Court was dismissed, and that of Muazzem Hossein in this suit was allowed, the result being that the suit was entirely dismissed.

Their Lordships have given their reasons for their opinion that a decree should have been made in favour of the plaintiff, and they will humbly advise Her Majesty to reverse the decrees of the Lower Courts, and to make a decree awarding possession to the plaintiff of the lands mentioned in the 12th paragraph of the plaint with mesne profits for three years previous to the institution of the suit, and from that until the delivery of possession or until the expiration of three years from the date of the decree, whichever first occurs.

As to the costs of the suit, their Lordships observe that the Subordinate Judge says he declined to award to the plaintiff the costs incurred by him in recovering the land, inasmuch as he could have obtained this relief in the suit of 1881 if he had not committed an error in his plaint in that suit, and full costs were given to him in that suit. This, they think, is a sufficient reason

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1888 for the costs of this suit in the Subordinate Court not being now awarded to the plaintiff, but he ought to have his costs of the appeals to the High Court, Nos. 25 and 26 of 1884, in which, according to their Lordships' opinion, the judgment should have been given in his favour. Their Lordships will humbly advise Her Majesty to make an order accordingly. The costs of this appeal will be paid by the Secretary of State.

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Appeal allowed.

Solicitors for the appellant: Messrs. *T. R. Wilson & Co.*

Solicitors for the respondent the
Secretary of State for India in } *The Solicitor, India Office,*
Council. } *Mr. R. T. Treasure.*

C. B.

P. C.
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HAIDAR ALI AND ANOTHER (APPELLANTS) v. TASSADDUK RASUL
AND OTHERS (RESPONDENTS).
EX-PARTE HAIDAR ALI.*

[On petition from the Court of the Judicial Commissioner
of Oudh.]

*Privy Council, Practice of—Practice relating to substitution of parties on
revivor—Representative character to be ascertained by Lower Court.*

On the death of a party on the record of an appeal pending before Her Majesty in Council, proof must be given in the Court from which the appeal has been preferred, of the representative character of the person or persons by or against whom revivor is sought. There ought to be some finding of the Court below; which, also, should give its own opinion as to who are the parties proper to be substituted upon the record. A certificate or statement on which their Lordships can act should be made by the Court below.

PETITION to revive an appeal from a decree of the Judicial Commissioner of Oudh, that Court having made an order (17th March 1888) rejecting a petition to bring on to the record certain persons alleged to represent parties deceased.

This petition related to an appeal to Her Majesty in Council, preferred by Haidar Ali and Fazl Ali, from a decree of the Judicial Commissioner. After the admission of that appeal, the present petitioner, on 1st December 1887, applied in the Judicial

* *Present: LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUGH.*

Commissioner's Court stating that two of the defendant-respondents, *viz.*, Ali Khan and Ikram Khan, had died, and asking that certain persons, whom he named, might be substituted for the deceased on the record; also that a guardian *ad litem* might be appointed for such of them as were minors. On notice being given of this petition, it was opposed by the defendants-respondents as barred by time. A relation of one of the minor heirs applied to be appointed his guardian *ad litem*; and also the Agent of the Court of Wards represented that the estate of one of the respondents, a minor, had come under his charge, under ss. 161 and 162 of Act XVII of 1876.

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The Judicial Commissioner rejected the petition. He was of opinion that, after the admission of the appeal to Her Majesty, he had no longer any authority in the suit, his Court being, in his view of the matter, no longer competent for any judicial act relating to it.

On this petition, which stated the above facts, Mr. R. F. Doyna appeared. The application was to revive the suit against the persons named. The Court below could ascertain the facts as to their real relationship to the deceased parties.

Their Lordships' judgment was delivered by Lord HOBHOUSE:—

Their Lordships think it is quite impossible for them to make an order upon these materials for altering the record. They have not got the facts before them, and it is very inconvenient that those facts should be tried here. There ought to be some finding of the Court below. The usual course is as laid down in Mr. Macpherson's book. He says (page 241):—"Of course in such cases the proper evidence must be given of the representative character of the persons by or against whom the revivor is sought. The title is more generally established upon petition to the Court below, which thereupon makes any inquiries which it may deem necessary, and orders the petition and proofs to be transmitted to England for such order as the Judicial Committee of the Privy Council may think fit to make."

The Court gives its own opinion as to who are the parties proper to be substituted upon the record. It has been the practice, so far as their Lordships can recollect, for a great

1838 number of years; and they now must request the Judicial
 HAIDAR ALI Commissioner to follow that which is the ordinary practice
 v. and to make a certificate or statement on which their Lordships
 TASSUDEUK can act.
 BASUL.

Solicitors for the petitioner:—Messrs. *Barrow & Rogers*.

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APPELLATE CIVIL.

*Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice
 Tottenham.*

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 March 2.

SYAMA SUNDERI DASSYA AND ANOTHER (PLAINTIFFS) v. JOGOBUN-
 DHU SOOTAR (DEFENDANT).

Evidence—Thak-maps—Boundary—Title, question of.

The sole question for determination being a question of the boundary of two taluqs, the Judge hearing the case refused to give effect to a certain thak-map which had been prepared in 1859, and upon the face of which appeared what were admitted by the parties then owning the taluqs to be the boundary lines of the taluqs at the time; no evidence was given showing that these boundary lines had ever been altered.

Held, that the map was clearly evidence of what the boundaries of the properties were at the time of the permanent settlement, and also as to what they admittedly were in 1859.

SUIT for the recovery of possession of certain land. Plaintiff No. 1 alleged that he had purchased taluq No. 703 at an auction sale held under Act XI of 1859, and that he had been formally put into possession thereof by the Collector; he further alleged that he had sold an eight-anna share in this taluq to plaintiff No. 2; that he and his co-plaintiff had endeavoured to occupy these lands, but were prevented from so doing by the defendant who alleged that the land claimed did not belong to taluq No. 703, but to taluq No. 600; and that he was a howlatdar under the proprietors of this latter taluq.

The Moonsiff held that as the dispute was not one between two rival taluqdars, and as the defendant had failed to establish

* Special Appeal No. 2357 of 1886, against the decision of Baboo Bani Madhub Mitter, First Subordinate Judge of Dacca, dated the 18th August, 1886, reversing the decision of Baboo Nil Money Nag, Second Moonsiff of Munshigunge, dated 31st January, 1885.